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Chan Wei Loon v Public Prosecutor and another appeal

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(M)-145–06 OF 2018(N) AND 05(M)-146–06 OF 2018(N)
TENGKU MAIMUN CHIEF JUSTICE, ZALEHA YUSOF AND HASNAH HASHIM FCJJ
6 MAY 2021

C

Criminal Procedure — Trafficking in dangerous drugs — 'Manufacturing' as act of trafficking — Whether facts and circumstances would determine whether prosecution had to prove element of 'possession' if case against accused was that he was involved in manufacturing illicit drugs — Whether mere fact accused occupied same premises where illicit drug-making equipment and illicit drugs were found, without more, could not automatically raise presumption that he was involved in manufacturing of the drugs and was therefore trafficking in them — Whether accused's engagement in some overt act of manufacturing at time of his arrest had to be shown to establish nexus between accused and act of manufacturing — Whether prosecution also had to show that premises where illicit drug-making equipment was found was not accessible to third parties in order to establish that accused had exclusive custody and control of the said equipment — Dangerous Drugs Act 1952 s 2

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The appellants, Chan Wei Loon ('CWL') and Lai Kar Meng ('LKM'), were both found guilty and sentenced to death by the High Court on two charges of drug trafficking under the Dangerous Drugs Act 1952 ('DDA') — the first charge was for trafficking in 20,000.21g of Nimetazepam at a double-storey shop-house ('the shop-house') while the second charge was for trafficking in 26,543g of the same drug in a double-storey house ('the house'). Both the shop-house and the house were rented by CWL at the material time. According to the prosecution's case, police raided the shop-house and purportedly arrested both the appellants on the ground floor of the building where the drugs which were the subject of the first charge were recovered and where various equipment and substances used in the manufacture of those drugs were also found. CWL thereafter led police to the house, situated not far from the shop-house, where the drugs stated in the second charge were recovered. In their defence to the charges at the trial, both appellants said they only occupied the first floor of the shop-house to carry on a business while the ground floor was sublet by CWL to a man named 'Ah Gu' who had told the appellants that he was in the business of manufacturing health supplements for men. Both the appellants said they had helped Ah Gu move various machines that he wanted to use for his business into the ground floor and that once Ah Gu's business went fully operational they never entered the ground floor, which, in any event, was not

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accessible to the appellants. CWL said Ah Gu, his girlfriend and his business partner occupied some of the rooms in the house while CWL and LKM occupied the master bedroom there. Both the appellants claimed that on the day of the police raid, they were on the first floor of the shop-house when the police entered the premises and arrested them. They were then taken to the ground floor of the premises after the police broke open the door to the ground floor. CWL said that even though he told the police that whatever items that were on the ground floor belonged to Ah Gu, they refused to listen. The appellants denied any knowledge of the impugned drugs found at the premises stated in both the charges. In convicting the appellants, the trial judge held that the prosecution did not have to prove the element of 'possession' because the presence of the drug-making equipment on the ground floor coupled with the appellants' fingerprints on the equipment were in themselves sufficient to prove that the appellants were involved in the manufacturing of the nimetezepam and that under s 2 of the DDA 'manufacturing' was itself an act of trafficking. The Court of Appeal ('COA') upheld the trial judge's decision, dismissed CWL's appeal against conviction and sentence on both the charges, affirmed LKM's conviction and sentence on the first charge but acquitted and discharged him on the second charge. In the instant appeals, CWL appealed against his conviction and sentence on both the charges whilst LKM appealed against his conviction and sentence on the first charge. A main issue in the instant appeals was whether in cases involving manufacturing of dangerous drugs it was necessary for the prosecution to prove that the accused had possession of the impugned drugs. The appellants argued that possession must be proven otherwise a person could be found guilty of trafficking simply because he occupied premises where illicit drug-making equipment containing his fingerprints were found, even though he had nothing to do with the manufacturing of the drugs. The appellants said that in such cases, the prosecution had to establish a nexus between the person accused of trafficking and the equipment by showing that at the time the person was arrested he was engaged in some overt act of 'manufacturing' as defined under s 2 of the DDA.

Held, unanimously acquitting and discharging both the appellants on the first charge; substituting CWL's trafficking conviction and sentence on the second charge with a conviction for possession of the impugned drugs under s 12(3) of the DDA and sentencing him to five years' jail with effect from his date of arrest:

(1) Whether or not possession was a necessary ingredient that had to be proven in a case involving manufacturing of dangerous drugs depended on the facts and circumstances of the case. In the instant case, based on the facts and circumstances of when and how the appellants were arrested, the element of possession had to be proven. The prosecution failed to do so. The courts below misdirected themselves by way of non-directions in not considering the ingredient of possession. On the

totality of the evidence, the convictions of both the appellants on the first charge on this ground alone were unsafe (see paras 95–96).

(2) The dispute in this case was over where the appellants were when the police raided the shop-house. The prosecution said they were arrested on the ground floor; the appellants claimed they were on the first or upper floor at the time. From the notes of proceedings, the evidence of the prosecution's witnesses on this matter was not convincing. Where the appellants were actually arrested was extremely important as it was doubtful whether they actually had control and custody of the items found on the ground floor if they were caught or arrested on the first floor (see paras 79–80 & 85).

(3) The evidence in SP14's police report ('D184') and his oral evidence as well as those of SP33 and SP34 on where the appellants were arrested materially contradicted each other. D184 was never produced by the prosecution but by the defence. What was the prosecution trying to hide? When SP14 made D184, he was definitely aware of the existence of the first and ground floors of the building. This was in stark contrast with his evidence in court. The original charge read 'Lot 185-1' which referred to the first floor of the premises. This was amended to 'Lot 185' after the prosecution had called 16 witnesses. In the light of the contradictions in the prosecution's evidence, there was grave doubt on whether the appellants were arrested on the first floor or the ground floor of the premises and the benefit of the doubt had to be resolved in favour of the appellants. In the light of D184 and the sudden amendment to the charge, the evidence of the prosecution witnesses had to be treated with caution and suspicion. The trial judge failed to give proper evaluation — in fact, no evaluation at all — to the material contradictions in the evidence of the aforesaid witnesses with regard to where in the building the appellants were arrested (see paras 86–89).

(4) No traces of the impugned drugs were found on the persons of the appellants, whether on their nails or the clothes that they were wearing, at the time they were arrested. There was also no evidence of the processing of the drugs found then, not even by the chemist. Therefore, no nexus was established between the appellants and the act of manufacturing. The word 'manufacturing' in s 2 of the DDA was used as a verb. Verbs were words that showed action or state of being. So, if a person was charged with manufacturing dangerous drugs, it was the prosecution's duty to show that at the time of the police raid, the accused was in action, namely, engaged in an act of manufacturing as defined by s 2 of the DDA, for example, he was in the act of producing or making or refining the drugs. The evidence of such acts must be there (see paras 77 & 90).

(5) The machines on the ground floor of the building contained the fingerprints of several unknown persons apart from those of the

appellants. The appellants had testified that they had helped carry the machines into the ground floor. The presence of their fingerprints did not give the irresistible inference that they manufactured dangerous drugs in the premises. From the DNA evidence, cigarette butts belonging to other persons were also found on the ground floor. The evidence, therefore, showed the possibility that third parties had access to the ground floor. The burden was on the prosecution to exclude the possibility that others had access to the ground floor to prove that the appellants were exclusively in custody and control of the dangerous drugs and machines found on the ground floor. The prosecution failed to establish such evidence (see paras 92–94).

(6) For the purpose of the instant appeals, the second charge only concerned CWL. There was merit in the argument that if — as found by the trial judge — the premises in the second charge was used to store the drugs which were manufactured in the first charge and if the first charge against CWL failed, the second charge against him must also fail and the second charge against CWL must be reduced to mere possession of the impugned drugs, especially as there were other occupants in the house at the time of the police raid. Accordingly, the conviction and sentence of trafficking against CWL on the second charge was quashed and substituted with an offence punishable under s 12(3) of the DDA. After considering CWL's mitigation, he was sentenced to five years' jail with effect from the date of his arrest (see paras 97–99).

[Bahasa Malaysia summary

Perayu-perayu, Chan Wei Loon ('CWL') dan Lai Kar Meng ('LKM'), kedua-duanya telah didapati bersalah dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas dua pertuduhan pengedaran dadah di bawah Akta Dadah Berbahaya 1952 ('ADB') — pertuduhan pertama adalah bagi pengedaran 20,000.21g Nimetazepam di sebuah rumah kedai dua tingkat ('rumah kedai tersebut') sementara pertuduhan kedua adalah bagi pengedaran 26,543g dadah yang sama di sebuah rumah dua tingkat ('rumah tersebut'). Kedua-dua rumah kedai tersebut dan rumah tersebut disewa oleh CWL pada masa yang material. Menurut kes pendakwaan, polis telah menyerbu rumah kedai tersebut dan kononnya telah menangkap kedua-dua perayu di tingkat bawah bangunan di mana dadah yang menjadi subjek pertuduhan pertama ditemui dan di mana pelbagai peralatan dan bahan yang digunakan dalam pembuatan dadah tersebut juga ditemui. CWL kemudiannya membawa polis ke rumah tersebut, yang terletak tidak jauh dari rumah kedai, di mana dadah yang dinyatakan dalam pertuduhan kedua ditemui. Dalam pembelaan mereka terhadap pertuduhan-pertuduhan semasa perbicaraan, kedua-dua perayu mengatakan mereka hanya menghuni tingkat pertama rumah kedai tersebut untuk menjalankan suatu perniagaan sementara tingkat bawah telah disewakan oleh CWL kepada seorang lelaki bernama 'Ah Gu' yang telah

memberitahu perayu-perayu bahawa beliau dalam perniagaan pembuatan makanan tambahan kesihatan untuk lelaki. Kedua-dua perayu mengatakan bahawa mereka telah membantu Ah Gu memindahkan pelbagai jentera yang ingin digunakan untuk perniagaannya ke tingkat bawah dan bahawa setelah perniagaan Ah Gu beroperasi sepenuhnya, mereka tidak pernah masuk ke tingkat bawah, yang mana, dalam apa-apa jua keadaan, tidak boleh diakses oleh perayu-perayu. CWL mengatakan Ah Gu, teman wanitanya dan rakan perniagaannya menghuni beberapa bilik di rumah tersebut sementara CWL dan LKM menghuni bilik tidur utama di sana. Kedua-dua perayu mendakwa bahawa pada hari serbuan polis, mereka berada di tingkat pertama rumah kedai ketika polis memasuki premis dan menangkap mereka. Mereka kemudiannya dibawa ke tingkat bawah premis tersebut setelah polis memecahkan pintu ke tingkat bawah. CWL mengatakan bahawa walaupun beliau memberitahu polis bahawa sebarang barangan yang berada di tingkat bawah adalah milik Ah Gu, mereka enggan mendengar. Perayu-perayu menafikan sebarang pengetahuan mengenai dadah yang dipersoal yang ditemui di premis-premis yang dinyatakan di dalam kedua-dua pertuduhan tersebut. Dalam mensabitkan perayu-perayu, hakim perbicaraan memutuskan bahawa pihak pendakwaan tidak perlu membuktikan unsur 'milikan' kerana kehadiran peralatan membuat dadah di tingkat bawah ditambah dengan cap jari perayu-perayu pada peralatan tersebut dengan sendirinya mencukupi untuk membuktikan bahawa perayu-perayu terlibat dalam pembuatan nimetezepam dan bahawa di bawah s 2 ADB 'pembuatan' sendiri merupakan suatu tindakan pengedaran. Mahkamah Rayuan ('MR') mengekalkan keputusan hakim perbicaraan, menolak rayuan CWL terhadap sabitan dan hukuman atas kedua-dua pertuduhan, mengesahkan sabitan dan hukuman LKM atas pertuduhan pertama tetapi membebaskan dan melepaskannya atas pertuduhan kedua. Dalam rayuan-rayuan semasa, CWL merayu terhadap sabitan dan hukumannya atas kedua-dua pertuduhan sementara LKM merayu terhadap sabitan dan hukumannya atas pertuduhan pertama. Isu utama dalam rayuan-rayuan semasa adalah sama ada dalam kes-kes yang melibatkan pembuatan dadah berbahaya, ianya perlu bagi pihak pendakwaan untuk membuktikan bahawa tertuduh mempunyai milikan terhadap dadah yang dipersoal. Perayu berhujah bahawa milikan mesti dibuktikan jika tidak seseorang boleh didapati bersalah untuk pengedaran hanya kerana beliau menghuni premis di mana peralatan pembuatan dadah haram yang mengandungi cap jarinya ditemui, walaupun beliau tidak ada kaitan dengan pembuatan dadah tersebut. Perayu-perayu mengatakan bahawa dalam kes-kes seperti itu, pihak pendakwaan perlu membuktikan hubungan antara orang yang dituduh untuk pengedaran dan peralatan dengan menunjukkan bahawa pada masa seseorang itu ditangkap beliau terlibat dalam tindakan 'pembuatan' secara terang-terangan seperti yang didefinisikan di bawah s 2 ADB.

Diputuskan, sebulat suara membebaskan dan melepaskan kedua-dua perayu atas pertuduhan pertama; menggantikan sabitan dan hukuman CWL atas

pertuduhan kedua dengan sabitan atas milikan dadah yang dipersoal di bawah s 12(3) ADB dan menjatuhkan hukuman penjara lima tahun kepadanya dari tarikh tangkapan:

(1) Sama ada milikan adalah elemen yang perlu yang mesti dibuktikan dalam suatu kes yang melibatkan pembuatan dadah berbahaya bergantung kepada fakta dan keadaan kes tersebut. Dalam kes semasa, berdasarkan fakta-fakta dan keadaan iaitu bila dan bagaimana perayu ditangkap, elemen milikan perlu dibuktikan. Pihak pendakwaan gagal melakukannya. Mahkamah di bawah ini telah salah arah dalam ketiadaan arahan dengan tidak mempertimbangkan unsur milikan. Pada keseluruhan bukti, sabitan kedua-dua perayu atas pertuduhan pertama atas alasan ini sahaja adalah tidak selamat (lihat perenggan 95–96).

(2) Pertikaian dalam kes ini adalah mengenai di mana perayu-perayu berada apabila polis menyerbu rumah kedai tersebut. Pihak pendakwa mengatakan mereka ditangkap di tingkat bawah; perayu-perayu mendakwa mereka berada di tingkat pertama atau tingkat atas pada masa itu. Dari nota-nota prosiding, keterangan saksi-saksi pendakwaan mengenai perkara ini tidak meyakinkan. Di mana perayu-perayu sebenarnya ditangkap adalah sangat penting kerana ianya diragu sama ada mereka benar-benar mempunyai kawalan dan jagaan barangan yang dijumpai di tingkat bawah sekiranya mereka ditangkap atau ditahan di tingkat pertama (lihat perenggan 77–80 & 85).

(3) Keterangan dalam laporan polis SP14 ('D184') dan keterangan lisannya serta keterangan SP33 dan SP34 mengenai di mana perayu-perayu ditangkap bertentangan secara material. D184 tidak pernah dikemukakan oleh pihak pendakwaan sebaliknya oleh pihak pembelaan. Apa yang cuba disembunyikan oleh pihak pendakwaan? Semasa SP14 membuat D184, beliau sudah pasti menyedari kewujudan tingkat pertama dan tingkat bawah bangunan tersebut. Ini adalah jelas bertentangan dengan keterangannya dalam mahkamah. Pertuduhan asal dibaca 'Lot 185-1' yang merujuk kepada tingkat pertama premis tersebut. Ini telah dipinda kepada 'Lot 185' selepas pihak pendakwaan telah memanggil 16 saksi. Berdasarkan percanggahan dalam keterangan pendakwaan, terdapat keraguan serius mengenai sama ada perayu-perayu ditangkap di tingkat pertama atau tingkat bawah premis dan manfaat keraguan tersebut perlu diselesaikan memihak kepada pihak perayu. Berdasarkan D184 dan pindaan secara tiba-tiba kepada pertuduhan, keterangan saksi-saksi pendakwaan perlu dikaji dengan berhati-hati dan dengan kecurigaan. Hakim perbicaraan telah gagal memberikan penilaian yang tepat — sebenarnya, tidak ada penilaian sama sekali — terhadap percanggahan material dalam keterangan saksi-saksi tersebut berkenaan dengan di mana dalam bangunan tersebut perayu-perayu telah ditangkap (lihat perenggan 86–89).

(4) Tidak ada kesan-kesan dadah yang dipersoal ditemui pada diri perayu-perayu, sama ada pada kuku mereka atau pakaian yang mereka pakai, pada masa mereka ditangkap. Tidak ada juga keterangan pemprosesan dadah yang ditemui pada masa tersebut, tidak juga oleh ahli kimia. Oleh itu, tidak ada hubungan yang dibentuk di antara perayu-perayu dengan tindakan pembuatan. Kata 'pembuatan' dalam s 2 ADB telah digunakan sebagai kata kerja. Kata kerja ialah kata-kata yang menunjukkan tindakan atau keadaan. Jadi, sekiranya seseorang dituduh dengan pembuatan dadah berbahaya, ianya adalah tugas pendakwaan untuk menunjukkan bahawa pada masa serbuan polis, tertuduh sedang bertindak, iaitu, melakukan tindakan pembuatan sebagaimana yang didefinisikan oleh s 2 ADB, misalnya, beliau dalam tindakan menghasilkan atau membuat atau menyempurnakan dadah tersebut. Keterangan tindakan sedemikian mesti ada (lihat perenggan 77 & 90).

(5) Jentera-jentera di tingkat bawah bangunan tersebut mengandungi cap jari beberapa orang yang tidak diketahui selain daripada milik perayu-perayu. Perayu-perayu telah memberi keterangan bahawa mereka telah membantu membawa jentera-jentera tersebut ke tingkat bawah. Kehadiran cap jari mereka tidak memberikan kesimpulan yang tidak dapat ditolak bahawa mereka menghasilkan dadah berbahaya di premis tersebut. Daripada bukti DNA, puntung-puntung rokok milik orang lain juga telah ditemui di tingkat bawah. Oleh itu, keterangan menunjukkan kemungkinan bahawa pihak-pihak ketiga mempunyai akses ke tingkat bawah. Beban adalah pada pihak pendakwaan untuk mengecualikan kemungkinan bahawa orang lain mempunyai akses ke tingkat bawah untuk membuktikan bahawa perayu-perayu secara eksklusif dalam jagaan dan kawalan terhadap dadah berbahaya dan jentera yang ditemui di tingkat bawah. Pihak pendakwaan gagal membuktikan keterangan seperti itu (lihat perenggan 92–94).

(6) Bagi tujuan rayuan-rayuan semasa, pertuduhan kedua hanya berkaitan dengan CWL. Terdapat merit dalam hujahan bahawa sekiranya — seperti dapatan oleh hakim perbicaraan — premis dalam pertuduhan kedua telah digunakan untuk menyimpan dadah yang dihasilkan dalam pertuduhan pertama dan sekiranya pertuduhan pertama terhadap CWL gagal, pertuduhan kedua terhadapnya juga mesti gagal dan pertuduhan kedua terhadap CWL mesti dikurangkan kepada hanya pemilikan dadah yang dipersoal, terutamanya memandangkan terdapat penghuni-penghuni lain di dalam rumah pada masa serbuan polis. Dengan itu, sabitan dan hukuman untuk pengedaran terhadap CWL atas pertuduhan kedua dibatalkan dan digantikan dengan kesalahan yang boleh dihukum di bawah s 12(3) ADB. Setelah mempertimbangkan mitigasi CWL, beliau dijatuhkan hukuman penjara lima tahun mulai dari tarikh penangkapannya (lihat perenggan 97–99).]

Cases referred to

Lee Boon Siah & Ors v PP and other appeals [2014] 2 MLJ 652, CA (distd)
Lim Son Heng v PP [2014] 6 MLJ 109, CA (refd)
Mohan Singh a/l Lachman Singh v PP [2002] 3 MLJ 291, CA (refd)
Ooi Hock Kheng v PP [2014] 5 MLJ 585, CA (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322, HC (folld)
Ong Hooi Beng & Ors v PP [2015] 3 MLJ 812; [2015] 1 LNS 63, CA (distd)
People of the State of Michigan v Ronald Wayne Mashell 265 Mich App 616, CA (refd)
R v Farir Crim LR 745 (refd)
United States v Brooks 438 F 3d 1231, CA (refd)
United States v Chesher 678 R 2d 1353, CA (refd)
United States v Lewis 621 F 2d 1382, CA (refd)
United States v Sullivan 919 F 2d 1403, CA (refd)

Legislation referred to

Criminal Procedure Code s 112(5)
Dangerous Drugs Act 1952 ss 2, 12(3), 37(b), (da), 39B, 39B(1)(c), (2)
Evidence Act 1950 s 32(1)(i)

Kee Wei Lon (Low Wei Loke with him) (Low & Co) for the first appellant.
Ram Karpal Singh (Harshaan Zamani with him) (Karpal Singh & Co) for the second appellant.
Mohd Dusuki Mokhtar (Nahra Dollah with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zaleha Yusof FCJ:

[1] In the High Court at Seremban, Chan Wei Loon, the appellant in Appeal No 05(M)-145–06 of 2018(N), (first appellant), and Lai Kar Meng, the appellant in Appeal No 05(M)-146–06 of 2018(N), (second appellant) (collectively referred to herein as 'the appellants') were charged on two charges of drug trafficking under the Dangerous Drugs Act 1952 ('the DDA 1952').

[2] The High Court found the appellants guilty of both charges and had sentenced the appellants to death.

[3] The appellants appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the first appellant's appeal and affirmed his conviction

and sentence on both charges. The appeal by the second appellant was also dismissed in respect of the first charge. However, the Court of Appeal allowed the second appellant's appeal against conviction and sentence on the second charge. Therefore, the second appellant was acquitted and discharged on the second charge.

[4] Thereby the appeal before us, by the first appellant against conviction and sentence on both charges; and by the second appellant, against conviction and sentence on the first charge. The public prosecutor (the respondent) did not appeal against the decision of the Court of Appeal in acquitting and discharging the second appellant on the second charge.

[5] To appreciate the issue, we shall now lay out the background facts leading to the charges, as encapsulated by the Court of Appeal, with slight modifications.

THE CASE FOR THE PROSECUTION

The first charge

[6] Acting upon information received, in the early hours on 23 October 2010, SP14 (ASP Nik Ezanee bin Mohd Faizal) with a team of police officers, raided a two storey shop house at No 185, Jalan Haruan 5/6, Kawasan Komersil Oakland, Seremban ('the said shop house'). He divided his men into four teams wherein he headed the first team; Insp Basri bin Husin (SP33) led the second team, SI Halim headed the third team; and Sjn Mustapha was head of the fourth team. Each of the teams was assigned with specific roles.

[7] Upon arrival at the said shop house, the teams took their respective positions assigned to them. SP14 and his group positioned themselves at about 20 meters away from the said premises, facing the front portion of the said shop house.

[8] At about 8.50am, SP14 saw a black coloured KIA motorcar bearing the registration number NBM 3614 ('the said car') stopped in front the said shop house. Both the driver and sole passenger of the said car exited the car and walked towards the said shop house. He identified the first appellant as the driver of the said car. The first appellant was wearing glasses and had a sling bag slung across his shoulders. SP14 further identified the second appellant as the passenger of the car, who was earlier seated at the front passenger seat, next to the first appellant.

[9] The said shop house was rented out to the first appellant by its owner, SP12 (Harendran a/l Perisamy), for a period of one year vide a tenancy

agreement (exh P129). There was an express prohibition (vide cl 2.7) against subletting, assigning, or part with the legal or actual possession of the said premises or any part thereof to any person or persons except with the prior consent in writing of the landlord SP12.

[10] SP14 saw the second appellant opening the door of the said shop house whereupon both the appellants then entered the premises. About 15 minutes later, both the appellants emerged from the premises and proceeded to pray at the praying alter, located in front of the premises. After they were done, both went back inside the said premises.

[11] The raiding team sprang into action at about 9.30am. Two members from SP14's team broke open the front door of the said shop house and another team proceeded to forcefully enter from the rear door of the said premises. When SP14 and his team rushed into the said shop house, both the appellants ran towards him and his team. It resulted in the arrest of both the appellants in no time.

[12] The premises is a double storey shop house. Both the appellants were purportedly arrested by SP14 and his team on the ground floor.

[13] SP14 and his team thoroughly examined the said shop house. On the ground floor, he found various types of machines and substance suspected of being used to manufacture illicit drugs and also substance suspected to be drugs in several black coloured plastic bags.

[14] The complete list of machines, powdery substance and other related items seized from both the appellants by SP14, were as itemised in the search list, exh P181, for the first appellant and search list, exh P182, for the second appellant.

[15] On 25 October 2010, at about 10.50am, the chemist, Dr Vanitha a/p Kunalan (SP6) visited the said shop house and examined the machines and the various types of substance found therein at the request of the police. At the end of the examination and analysis, she found that the said shop house had been used to process and manufacture 'Eramin 5' pills.

[16] The items found by SP6 were listed by the learned trial judge in para 20 of her grounds of judgment as follows:

> [20] SP6 mengesahkan:
>
> (a) terdapatnya serbuk 'Nimatezepam' ditempat-tempat berikut:
>
> (i) mesin di ruang tengah premis eksh P16; dan

(ii) mesin ketuhar di ruang belakang premis (eksh P20A)

(b) bahan-bahan kimia yang diperlukan bagi penghasilan pil tersebut, iaitu:

(i) cellulose di bahagian tengah premis (eksh B6A dan B7A);

(ii) starch (kanji) di bahagian belakang premis (eksh P162);

(iii) aspartame di bahagian tengah premis (eksh P148E);

(iv) mentol di bahagian ruang tengah premis (eksh P151A);

(v) lactose di mesin bahagian ruang tengah Premis (eksh P16);

(vi) magnesium strearate di bahagian tengah ruang premis (eksh P152);

(vii) hydropopylmethyl cellulose di bahagian belakang premis (eksh P160A dan P161A); dan

(viii) ethanol di bahagian tengah ruang premis (ekshibit P154E).

(c) pewarna yang telah digunakan untuk penghasilan tablet berwarna oren. Warna oren ini adalah campuran tiga jenis warna, iaitu:

(i) erythrozines di bahagian tengah ruang premis (eksh P148G);

(ii) tartrazine di bahagian tengah ruang premis (eksh P147B dan P147C) dan

(iii) ponceau 4R di bahagian tengah ruang premis (eksh P148H).

(d) terdapat mesin-mesin yang digunakan dalam penghasilan tablet ini untuk menghasilkan serbuk berwarna oren. Mesin- mesin tersebut adalah seperti berikut:

(i) mesin di ruang tengah (ekshibit P16) bertanda B1 dalam rajah kasar (eksh P127).
Mengikut SP6, mesin ini digunakan untuk mencampurkan dan mengaulkan bahan- bahan ramuan iaitu Nimatezepam, lactose, magnesium, strearate, cellulose, menthol,
Hydropylmenthl Cellulose, Starch, Aspartame dan tiga pewarna iaitu Tartrzine, Ponceau 4R dan Erythrozine;

(ii) mesin di ruang hadapan premis (eksh P14) (bertanda A1 dalam rajah kasar).
Mesin ini digunakan selepas mengeluarkan 'dough' daripada mesin B1. Mesin ini berfungsi sebagai pembentuk untuk mengeluarkan bahan dan serbuk berwarna oren daripada 'dough' tersebut.

(iii) oven di bahagian belakang premis (eksh P20A dan P20B).
Hasil daripada serbuk oren ini akan dimasukkan ke dalam oven (ekshibit P20A dan P20B) menggunakan tray-tray dalam oven tersebut bagi tujuan pengeringan (dalam gambar 40 hingga 43 (eksh P5).

(iv) mesin pengayak di bahagian tengah premis (eksh B17).
Bahan yang dikeringkan tadi ini akan dimasukkan ke dalam mesin pengayak (gambar 28 hingga 29 (eksh P5). Tujuannya adalah untuk mengasingkan ketulan dan serbuk berwarna oren. Jadi yang keluar daripada mesin ini adalah serbuk warna oren yang halus.

(v) mesin di ruang hadapan premis (tandaan A2) eksh P14).
Serbuk halus berwarna oren ini akan dimasukkan ke dalam mesin bagi membentuk pil-pil yang berwarna oren. Pil-pil berwarna oren ini mempunyai logo yang sama dengan acuan 'tableting' mesin ini.

(vi) mesin di bahagian hadapan premis (bertanda C8 eksh P18).
Mesin digunakan untuk memasukkan pil-pil berwarna oren itu ke dalam kepingan aluminium (gambar 34 (eksh P5) (eksh P27a dan P27b) bagi tujuan pembungkusan.

[21] Selepas memeriksa mesin-mesin dan menganalisa bahan-bahan yang ditemui, SP6 telah menyediakan Laporan Kimia, eksh P24.

[17] Mohd Helmi b Rasdi (SP4), an assistant mechanical engineer attached with JKR Cawangan Mekanikal, Negeri Sembilan, was also asked by the police to certify the serviceability/operability of the above-said machines.

[18] SP4 found the machines he had examined, namely:

(a) machines marked A1 and A2 (exh P14) as shown in photographs No 19, 21 and 22 (exh P5) at the front portion of the shop house;

(b) machine marked (exh P16) shown at photographs Nos 25 and 26 of exh P5 and the machine marked B5 (exh P17) shown at photograph No 30 of exh P5 at the middle portion of the said shop house; and

(c) one machine comprising of two ovens (exhs P20A and P20B) and one set of compressor as shown in photographs Nos 30, 33, 34, 37 and 38 of exh P5, at the rear portion of the said shop house,

were all in good condition, serviceable and could be operated upon.

[19] SP14 also seized thousands of orange coloured pills from various places inside the said shop house, on the ground floor in which he later handed them over to the investigating officer, Insp Juliana bt Kassim (SP40). The latter eventually re-marked the exhibits with the markings J1, J2(i), J2(ii), J2(iii), J2(iv), J2(v), J2(vi), J2(vii), J2(viii), J2(ix), J2(x) and J2(xi). In court the exhibits were marked as P61A, P62, P64A, P65A, P66B, P67A, P68A, P69A, P70A, P72A and P73A respectively.

[20] In her report SP6 stated that she analysed the said exhibits and found them to contain 20,000.21g of nimetezepam, the subject matter of the first amended charge, exh P63. SP6 also confirmed that Nimetazepam is a scheduled drug under the First Schedule of the DDA 1952.

[21] At the end of the prosecution's case, the learned trial judge found that the prosecution had established a prima facie case against both the appellants in respect of the first amended charge and both the appellants were ordered to enter their defence.

The second charge

[22] On the same day ie on 23 October 2010, at about 2pm, SP33 together with SP34 (D/Corp Sarbani bin Abdullah) and four other officers raided a house number 861, Jalan S2 D23, Garden City Homes, Seremban 2, Negeri Sembilan ('the said house') upon SP14's instruction.

[23] The said house was purportedly rented by the first appellant commencing from 1 June 2010, from its owner through the services of a housing agent (SP37) vide a tenancy agreement, exh P207. SP38, who was SP37's assistant confirmed that he had taken the first appellant to visit the said house prior to the signing of the tenancy agreement by the landlord and the first appellant. SP38 also confirmed that he had handed the keys of the said house to the first appellant. Both SP37 and SP38 identified the first appellant as the tenant of the said house at the material time of the police raid.

[24] The first appellant was taken by the police to the said house in the said raid.

[25] The said house is a double storey terrace house. It took about 15 minutes for SP33 and his party to reach the said house from the said shop house that was earlier raided by SP14.

[26] SP33 found the front door of the said house locked. He used the keys retrieved from the first appellant front right trousers pocket to open the said door. Once opened, SP33 entered the said house together with the first appellant and members of his team.

[27] The front door led SP33 and his party to the main hall. At the main hall, SP33 saw and subsequently seized the following exhibits:

(a) one blue drum ('tong') (marked A, exh P189) containing a transparent plastic packet which further contained white powdery substance ('serbuk putih') (exh P189A);

(b) one blue drum (marked A1, exh P190) containing a transparent plastic packet which further contained white powdery substance (exh P190A);

(c) one blue drum (marked A2, exh P91) containing white powdery substance (exh P191A); and

A (d) one blue coloured box (marked A3, exh P192) containing 20 pieces of plastic containers (marked A3a, exhs P193, P194A to P194T).

These exhibits were found at the location marked X in the sketch plan (see exh P195).

B

[28] In a room located on the same (ground) floor of the said house, SP33 found and seized a luggage bearing the brand of 'World Proof Polo King' (exh P197). Inside the said luggage were six plastic packets containing substances suspected to be drugs.

C

[29] In the master bedroom located on the upper (first) floor of the said house, SP3 seized a green pail (exh P85). Inside the pail was a small bottle written with the word 'Bird Nest' (exh P85A) containing 348 pieces of Eramin 5 pills (exh P85B).

D

[30] SP33 also found and arrested a Vietnamese woman (Nguyen Thi Thu Trang), then lying on a mattress in the master bedroom. Investigation revealed that she was a GRO at one of the night spots in town and was taken home by the first appellant for 'a little bit of fun'.

E

[31] There were several clothes seized from the said house. In addition, an Astro bill in the first appellant's name (exh P237) and the second appellant's passport (exh P241) and bank account book (exh P242) were seized from the said house.

F

[32] The exhibits and the Vietnamese woman were subsequently brought back to IPD, Seremban and handed over to SP47 (Insp Mohd Airul Shukri @ Remy bin Saini), the investigating officer in respect of these seizures from the said house.

G

[33] SP47 subsequently re-marked the six packets of suspected drug exhibits recovered from the luggage exh P197 with the markings R26, R27, R28, R29, R30 and R31 respectively. In court the said exhibits were marked as exhs P83A, P83B, P83C, P84A, P48B and P84C respectively. Pieces of Eramin 5 pills (exh P85B) were sent to the chemist, SP6, to identify the nature, contents and weight of the said substances.

H

I **[34]** SP6 analysed the said exhs and found them to contain 26,543g of Nimetazepam, the subject matter of the second charge. Her report on this is exh P82.

[35] At the time of the commencement of the trial against both the appellants, the Vietnamese woman could no longer be found. Her whereabouts was unknown. The learned trial judge consequently allowed the prosecution's application to admit the Vietnamese woman's statement recorded under s 112(5) of the Criminal Procedure Code in evidence under s 32(1)(i) of the Evidence Act 1950. Her ladyship's reasons in allowing so were set out in her grounds of judgment at paras 68, 69, 70 and 74. The Court of Appeal were with the learned trial judge and could find no error to invalidate the admission of the said document in evidence, which was marked as exh D227.

[36] The Vietnamese woman stated in exh D227 that on the night before the incident, she was working as a GRO at Pusat Hiburan Solid Gold, Seremban and had entertained both the appellants until the wee hours of the morning. Finally, she was paid RM300 by the first appellant to sleep with him. Then, she was taken home by the first appellant, with the second appellant tagging along. All the three slept in the same room on the first (upper) floor. There were no other occupants in the said house. She was arrested by the police the next day, still sleeping, in the same room she had slept with the first appellant.

[37] At the end of the prosecution's case, the learned trial judge also found that the prosecution had established a prima facie case against both the appellants in respect of the second charge and both the appellants were ordered to enter their defence.

THE CASE FOR THE DEFENCE

[38] Both the appellants gave an unsworn written statement from the dock and their defence appeared strikingly identical.

[39] Both the appellants stated that they were engaged in providing alarm and CCTV service business at the said shop house.

[40] The first appellant further stated that he had entered into a tenancy agreement to rent the said double storey shop house. However, he had sublet the ground floor of the shop house to his old acquaintance, one Ah Gu. Hence, he had only occupied the upper (first) floor to run his business with the second appellant.

[41] The said Ah Gu had earlier examined the ground floor of the shop house where he had come with Ah Kam and Ah Weng before agreeing to rent the ground floor from the first appellant.

A **[42]** Thereupon, the said Ah Gu and his friends started to move in various types of machines and other related stuffs and accessories to start his business. When queried, Ah Gu told both the appellants that he had wanted to produce 'Ubat Kuat Untuk Lelaki' .

B **[43]** Both the appellants stated that they had assisted Ah Gu to carry the machines and other related stuffs and had placed them inside the ground floor of the said shop house and had also been chatting and smoking cigarettes with Ah Gu and his friends there.

C **[44]** The first appellant also offered Ah Gu and Ah Weng to stay with him at the said house (House No 861, City Homes) since there were vacant rooms in the said house. The Vietnamese woman was Ah Gu's girlfriend.

D **[45]** Ah Gu and his girlfriend occupied one of the rooms on the upper floor while Ah Weng occupied the room next to Ah Gu's room. Meanwhile, the first and second appellants took the master bedroom for themselves.

[46] Both the appellants averred that they had never entered the ground
E floor portion of the shop house once Ah Gu's business went fully operational. The said portion was closed most of the time and the access card they both had could only open the grille door of the shop house and not the ground floor of the same.

F **[47]** Both the appellants claimed that on the day of the incident, both of them were chatting and doing their own thing on the first (upper) floor of the shop house when the police broke open the door of the first floor and arrested both of them. They insisted that they were arrested on the first floor of the shop
G house before they were taken down to the ground floor.

[48] Both the appellants also insisted that the police had to forcefully break open the door of the ground floor as no keys to open the said door were available from either of the appellants.

H **[49]** When the door was finally forced opened, both the appellants claimed that they saw boxes, drums and powdery substance of unknown origin all over the ground floor. The first appellant claimed that he had told the police that the boxes, drums, machines and powdery substance therein belonged to Ah Gu.
I However, the police refused to listen.

[50] Both the appellants also denied having knowledge of the drugs seized by SP33 and his team at the said house involving the second charge.

[51] At the end of the defence's case, the learned trial judge found that both the appellants had failed to raise any reasonable doubt in the prosecution's case and had also failed to rebut the presumption under s 37(b) of the DDA invoked against them in both the charges on the balance of probabilities. Both the appellants were eventually found guilty by the High Court of both the charges and were sentenced to death on both counts.

[52] Aggrieved, the appellants appealed to the Court of Appeal; which as alluded to earlier affirmed the decision of the High Court on the first charge against both the appellants and the first charge against the appellant but acquitted and discharged the second appellant on the second charge.

THE CHARGES

[53] The original first charge against the appellants stated the address of the offence as 'Rumah Kedai Lot 185-1'. However, the address in the original charge was amended on 18 March 2013, after the prosecution had called 16 witnesses. Thus, the two charges against the appellants now read as follows:

> Tuduhan Pertama (Pindaan):
>
> Bahawa kamu pada 23hb Oktober 2010, di premis rumah kedai Lot 185, Jalan Haruan 5, 5/6, Pusat Komersial Oakland II, di dalam daerah Seremban, di dalam Negeri Sembilan, dengan niat bersama telah melakukan perbuatan bagi tujuan mengedar dadah berbahaya iaitu Nimetazepam seberat 20,000.21 gram dan dengan itu melakukan suatu kesalahan di bawah seksyen 39B(1)(c) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah s 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.
>
> Pertuduhan Kedua:
>
> Bahawa kamu pada 23hb Oktober 2010, lebih kurang jam 2.15 petang, di rumah No. 861, Jalan S2 D23, City Homes di dalam Daerah Seremban, di dalam Negeri Sembilan dengan niat bersama telah mengedar dadah berbahaya iaitu Nimetazepam seberat 26,543 gram dan dengan itu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(b) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama di baca bersama dengan seksyen 34 Kanun Keseksaan.

OUR ANALYSIS AND DECISION

[54] On the first charge, the appellants raised three issues before us, namely possession, double presumptions and access by the third party. However, the main focus was the issue of possession; namely, whether possession is an essential ingredient in a case involving manufacturing of dangerous drugs and thus it needs to be proven before the trafficking definition in s 2 of the DDA 1952 can be invoked.

[55] On this, the learned trial judge found that the shop house was used as a drug manufacturing factory based upon the seizure of various types of machines, apparatus and chemical substance that can be used to process drugs that were found at the ground floor of the said shop house where both the appellants were arrested. The learned trial judge took the view that it was unnecessary for the prosecution to prove possession in manufacturing cases and the findings on manufacturing is sufficient to prove the offence of trafficking by manufacturing. This can be seen in the following paragraphs in the grounds of judgment of Her Ladyship:

> [27] Mahkamah memutuskan berdasarkan keadaan premis yang diserbu yang menjadi kilang/makmal memproses dadah, adalah jelas bahawa OKT-OKT telah melakukan atau menjalankan pengedaran dadah secara terus 'direct or actual tranfficking.
>
> [41] ... Mahkamah memutuskan memandangkan pihak pendakwaan telah membukti bahawa kedua-dua OKT tersebut memproses/mengilang dadah maka elemen pemilikan adalah tidak perlu dibuktikan. Mahkamah bersandarkan kepada keputusan *Lee Boon Siah v Public Prosecutor*.
>
> [42] Keputusan kes *Lee Boon Siah* adalah kedudukan undang-undang hari ini iaitu bagi pertuduhan 'manufacturing' pihak pendakwaan tidak perlu membuktikan 'possesion' — milikan. Ini adalah kerana Seksyen 2 memperuntukkan secara khusus definisi perkataan 'manufacture' iaitu termasuk 'making, producing, compiling and assembling of the drug' tidak seperti perbuatan lain yang didefinisikan sebagai 'trafficking'.
>
> [49] Atas isu ini mahkamah bersetuju dengan hujahan pendakwaan bahawa memandangkan pihak pendakwaan telah berjayamembuktikan premis tersebut adalah mempunyai peralatan memproses/mengilang dadah, maka kedua-dua OKT telah melakukan pengedaran secara terus — direct trafficking seperti yang telah diputuskan oleh kes *Lee Boon Siah v Public Prosecutor* di mana pihak pendakwaan tidak perlu membuktikan elemen milikan.

[56] In affirming the decisions of the learned trial judge, the Court of Appeal found as follows:

> [63] In all the circumstances of the case though, the statement stated at para 32 of *Lee Boon Siah v Public Prosecutor* represents the correct proposition of the law relating to cases involving drug manufacturing. Hence, the learned trial judge did not commit any error of law when she ruled that the ruling in *Lee Boon Siah v Public Prosecutor* applied unequivocally to the facts of the present case.
>
> [64] It is very important to note that in this instant appeal, the case for the prosecution was not based on custody of control thereby invoking the notion of mens rea possession of the said drugs or attracting the presumption of possession and knowledge under s 37(d) of the DDA or invoking the presumption of trafficking under s 37(da) of the same Act. Rather, the persecution founded its case of trafficking of the said drugs on 'manufacturing', one of the acts that constitute trafficking within the definition of s 2 of the DDA.

> [67] In our judgement, for the reasons enumerated below, the act of manufacturing dangerous drug is one of those acts of trafficking where the element of possession of the drugs would assumed little relevance or no relevance at all.
>
> [71] By its plain and ordinary meaning of 'manufacture' or 'manufacturing' given by renowned dictionaries and by the DDA itself as enumerated above, it appears to us that in essence, it is all about the doing of an act, action, state or occurrence, more specifically the doing or the making of something whether manually or by machines. Hence, in the context of s 2 of the DDA, what needs to be proven is the making, producing, compounding and assembling of the drug or a preparation of the drug or refining or transformation of the drug into another dangerous drug or any other process done in the course of the foregoing activities. In such event, happening or occurrence, there is no requirement to prove possession of the impugned drugs as the process of making or producing, etc. in itself had excluded the element of possession of the same.

[57] In essence, the Court of Appeal was of the view that possession was not an essential ingredient in a case involving manufacturing of drugs and thus need not be proven before the trafficking definition under s 2 of the DDA 1952 can be invoked. The learned trial judge did not err in finding that the prosecution had proven that the appellants were engaged in the manufacturing of the impugned drugs and that 'manufacturing' was itself an act of trafficking under s 2 of the DDA 1952 which did not require possession to be proven. The quantity of drugs manufactured was immaterial as the act of trafficking was not dependent on the quantity of drugs that was manufactured. Hence, even if only one gram of dangerous drug was manufactured, it was still trafficking and could attract s 39B of the DDA 1952 into motion.

[58] This view was further reflected in paras 72–74 of the Court of Appeal's grounds of judgment. For those reasons, the Court of Appeal was of the view that possession is not an essential ingredient in a case involving manufacturing of drugs and thus it need not be proven before the trafficking definition in s 2 of the DDA can be invoked.

[59] Mr Ram Karpal Singh for the second appellant whose oral submission was adopted by Mr Kee Wei Lon for the first appellant, argued that the High Court and Court of Appeal had erred when they held that it was unnecessary for the prosecution to prove possession in cases of manufacturing. The courts below had relied on *Lee Boon Siah & Ors v Public Prosecutor and other appeals* [2014] 2 MLJ 652 However learned counsel submitted, it is pertinent to note that the Court of Appeal in *Lee Boon Siah*, did not consider the question of whether a 'manufacturing' case under s 2 of the DDA 1952, requires proof of possession first save for its reliance on the cases of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 and *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; when those cases were not 'manufacturing' but were instead 'sale' cases under s 2 of the DDA 1952.

[60] Both learned counsel for the appellants submitted that there must be an overt act of 'manufacturing' and mere presence in the premises in which the machines were found cannot, in itself, amount to trafficking. The case of *Ooi Hock Kheng v Public Prosecutor* [2014] 5 MLJ 585 was cited although it was not a 'manufacturing' case but it was submitted that the principle in *Ooi Hock Kheng*, applies equally to 'manufacturing' cases; namely, that there must be some overt act of trafficking before a definition under s 2 of the DDA 1952 is applied and further, if the drug in question is not listed under s 37(da) of the DDA 1952; such as Nimatazepam in this case, there ought to be direct evidence of trafficking or affirmative evidence of trafficking since the presumption of trafficking does not apply.

[61] Mr Ram argued that if mere presence without proof of possession is sufficient to prove the offence of manufacturing, than a security guard who was engaged to guard the premises, and has touched the machine would be found guilty just because of his presence and his finger print is found on the machine. This, he said, cannot be the case. He cited cases from the United States (cases of *People of the State of Michigan v Ronald Wayne Mashell* 265 Mich App 616; *United States v Sullivan* 919 F 2d 1403; *United States v Lewis* 621 F 2d 1382; *United States v Chesher* 678 R 2d 1353 and *United States v Brooks* 438 F 3d 1231) and a case from the United Kingdom *(R v Farir)* Crim LR 745 to show that in other jurisdictions, possession and overt acts need to be proven in manufacturing of drugs cases.

[62] On the other hand, the prosecution took the stand that possession is not an essential ingredient in a trafficking case involving manufacturing of drug cases and thus it need not be proven before the trafficking definition in s 2 of the DDA 1952 can be invoked. The line of submission of the learned DPP, Dato Mohd. Dasuki was similar to the approach taken by the learned judges of the High Court and Court of Appeal in this case.

[63] As alluded to earlier, the appellants were charged for trafficking in dangerous drugs under s 39B of the DDA 1952. The said s 39B provides as follows:

> 39B Trafficking in dangerous drug.
>
> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —
>
> (a) Traffic in a dangerous drugs;
>
> (b) Offer to traffic in a dangerous drugs; or
>
> (c) To or offer to do an act preparatory to or for the purpose of trafficking in dangerous drug.

(2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

[64] So, what is trafficking? Trafficking is defined by s 2 of the DDA 1952 as follows:

'trafficking' includes the doing of any of the following acts, that is to say., manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

[65] As can be seen, manufacturing is one of the acts of trafficking. What constitutes as 'manufacture' can also be found in the definition section of s 2 of the DDA 1952 which says :

'manufacture', in relation to a dangerous drugs, includes —

(a) The making, producing, compounding and assembling of the drug;

(b) The making, producing, compounding and assembling a preparation of the drug;

(c) The refining or transformation of the drug into another dangerous drug; and

(d) Any process done in the course of the foregoing activities.

[66] Although the DDA 1952 does not specifically state the ingredients to be proven when one is charged for trafficking, decisions of our apex court have shown that one of the main elements that needs to be established is the accused is in possession of the dangerous drugs. One of such cases is *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193, wherein Ariffin Zakaria FCJ (as His Lordship than was) had at p 201 stated the following:

... In order to sustain a conviction for an offence under s 39B of the Act, there has to exist a positive finding of possession by the trial judge independent of the statutory presumption under s 37(d) of the Act and such a finding has to be unequivocal.

[67] His Lordship had further stated that the mere act of carrying is not sufficient to constitute the offence of trafficking.

[68] The parties, as well as the learned trial judge had placed reliance on the case of *Lee Boon Siah.* In that case, the accused persons were convicted for trafficking based on 'manufacturing'. However, we noted, in that case there was evidence adduced showing that the accused persons were caught in the act of manufacturing at the time of the police raid. The relevant passages are reproduced:

> [9] In the said factory, PW5 conducted a search at the lower floor of the said factory and found a brown metallic coloured Honda Odyssey car registration plate no. SDL 5443L. Next, PW5 and his team proceeded to the back door of the factory. When the back door was opened, PW5 found all the five accused persons. They were in a state of fright and their clothings were in disarray as if they had just completed carrying out some work. All the five accused persons were then handcuffed. After that, they were taken to the front area of the factory.

And the Court of Appeal explained the nexus in this manner:

> [30] Even more to the point, as correctly found by the learned trial judge, there was a nexus between the five accused persons and the dangerous drugs exhibits seized. The five accused were arrested in the factory premise. The five accused persons were actually arrested in the premise of the factory because there was a wall encircling the perimeter of the said factory. Tellingly, the clothes of the accused also had methamphetamine stains: t-shirt of the first accused; blue jeans pants brand name 'Exhaust' of the second accused: and shirt brand 'Camel' of the third accused. PW4 also confirmed that, apart from second and fourth accused, 'hand swab' of the right and left hand collected by PW9 from all the five accused persons at the factory contained methamphetamine. PW12 confirmed that the DNA profile of all the accused persons were found on the following items: underwear and tooth brush (first accused); underwear (second accused); glove (third accused); cotton swipe (fourth accused); and glove (third, fourth and fifth accused persons).

[69] The Court of Appeal in *Lee Boon Siah*, had held that the manufacturing of the dangerous drugs in that case did not involve possession. However, it was clear from the facts of that case, not only that the appellants there were found and caught on the same floor where the machines were, the clothes they were wearing and their hands had stains of the same drugs found. There was therefore no doubt they were in control and custody of the said machines and hence, having possession of the drugs.

[70] As such, even though the Court of Appeal in *Lee Boon Siah*, held that the manufacturing of the drug in that case did not involve possession, the facts showed that the element of possession did exist in that case.

[71] The learned DPP had referred to another Court of Appeal decision in *Lim Son Heng v Public Prosecutor* [2014] 6 MLJ 109 to support his argument that possession need not be proven in manufacturing of dangerous drugs case as in that case the premises was opened with the key found on the body of the accused person and in the premises, dangerous drugs were found together with various utensils and tools which were suspected to be used for manufacturing dangerous drugs. So, even though there was no eyewitness who saw the accused in the act of making or producing the impugned drugs, the court still found him guilty of manufacturing.

[72] With due respect to the learned DPP, the accused in *Lim Son Heng*, was

arrested as he was leaving the premises after locking the grille and the main door. When he was arrested, and when he opened the grille and the door of the premises, there was no one else in the premises and the drugs together with several illicit drug making utensils were discovered in the unlocked main room of the premises. Therefore, the Court of Appeal found he had control, custody, knowledge and hence possession of the drugs. The Court of Appeal held, inter alia:

> (2) There was no doubt the appellant had possession of all things inside the premises to the exclusion of others. The keys to the premises were recovered from him; the evidence of four witnesses identified him as the tenant of the premises ... All the doors to the rooms in the premises were also unlocked showing that the appellant enjoyed complete custody and control of the place and of the items found therein. The evidence when taken together led to the conclusion that at all times the offending drugs were in the appellant's custody and control and the irresistible inference was that he had knowledge of the drugs. The prosecution had made out a case of actual possession.

[73] In our view, *Lim Son Heng*, is another case to illustrate that possession is still an essential ingredient in a case involving manufacturing of dangerous drugs and thus it needs to be proven before the trafficking definition in s 2 of the DDA 1952 can be invoked. The general rule in our view is, for a person to be trafficking in dangerous drugs, he must have the drugs in his possession. Even though the DDA 1952 does not explicitly define 'possession', earlier decisions of our courts have established that possession must be with mens rea, that the person must be aware of his possession, that he has the exclusive power to deal with the drugs.

[74] On 'possession', this court in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194 at p 201; [2009] 2 CLJ 209 at pp 217–218 had stated the following:

> [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] MLJ 28; [1955] 1 LNS 53:
>
> > it is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
> >
> > Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[18] Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237; [1956] 1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in Stephen's Digest (9th Ed, p 304), in which the exclusive element mentioned by Taylor J appears:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[75] Thus it is clear to our mind that trafficking cases require proof of possession with the exception of a few such as in cases of sale and supply of dangerous drugs as decided by this court in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 at p 717 as follows:

> It must be observed that *most of the acts that constitute 'trafficking' as defined in s 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstrated by Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, It follows that a person cannot keep, conceal, store, transport orcarry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. Proof of further facts to establish any one of these acts is therefore sufficient to make out a case of trafficking. Thus it is true, as the (then) Supreme Court observed in *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 (at p 163), that '... the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication'. The offence is therefore complete upon proof of the relevant act that constitutes 'trafficking' as defined in s 2 of the Act and the purpose of such act is not material. The weight of the dangerous drugs involved is not a determinative factor (see *Leong Siew Hoong v Public Prosecutor* [1988] 1 MLJ 396). Personal consumption may be set up to explain the possession of the drugs (see *Cohen Lorraine Philis & Anor v Public Prosecutor* [1989] 3 MLJ 289; *Ng Chai Kem v PP* [1994] 2 MLJ 210; *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337). (Emphasis added.)

[76] In another case of *Ong Hooi Beng & Ors v Public Prosecutor* [2015] 3 MLJ 812; [2015] 1 LNS 63, the appellants were charged under s 39B(1)(c) of the DDA 1952 with an offence of doing an act preparatory to trafficking in dangerous drugs, almost similar to the appeal before us. They were arrested during a raid on a factory under the style and name of Zmas Synergy Sdn Bhd which was suspected to be used as a clandestine drug processing laboratory. Their charge was for manufacturing of the drugs which is an act of trafficking

by definition of s 2 of the DDA 1952. All the appellants denied any involvement in drug processing. However, at the time of their arrest all of them were inside the factory where the drugs and drug manufacturing apparatus were found. Not only that, traces of methamphetamine were found on the appellants' fingernails, hair and clothing. And they were not able to explain how those traces came to be found there. The Court of Appeal agreed with the trial judge that the traces of methamphetamine found on the appellants' fingernails, hair and clothing indicated that they had knowledge of the drugs and this evidence was compelling evidence which showed their active involvement in processing the drug at the factory. In other words, they had mens rea possession

[77] Looking at the DDA 1952 further, the word 'manufacturing' or the definition of 'manufacturer' under s 2 of the DDA 1952 is used as a verb. Verbs have been traditionally been defined as words that show action or state of being. What it means, if a person is charged with manufacturing the dangerous drugs, it is the duty of the prosecution to provide that at the time of the police raid, the accused person is in action, namely, is engaged in the acts of 'manufacture' as defined by s 2 of the DDA 1952; for example, he was in the act of producing or making or refining the drugs. The evidence of such act must be there. This was what happened in *Ong Hooi Beng*, and even *Lee Boon Siah.*

[78] Generally we are of the view that possession is an essential ingredients to be proven for manufacturing cases. But of course there will always be exceptions depending on the facts and circumstances of a particular case. For example, when an accused person is caught giving instruction to others to process the drugs when he himself is not having the drugs on his body or not touching the machine. His presence there is not mere presence but for the purpose of manufacturing the drugs. The nexus is there, or, as in the case of *Lim Son Heng*, even though the accused was not caught in action, based on the facts and circumstances of the case, he was still found to be in possession of all things inside the premises

[79] Coming back to the instant appeal. Had trafficking been proven here? The premises of the first charge was a double storey shop house. The drugs and the apparatus were found on the ground floor of the premises. That was not in dispute. What was in dispute was where the appellants were when the police raided the premises. The prosecution said they were arrested at the ground floor. The defence's story was they were at the first or upper floor.

[80] However, having perused the notes of proceedings, we found that the evidence of the prosecution witnesses on this was not convincing. SP14 in his police report marked as D184 had in para 3 stated that they went to the premises no Lot 185-1, Jalan Haruan 5/6, Pusat Komersial Oakland II,

Seremban:

> Saya telah memecah (1) pintu grill (Berscan) dan (2) pintu kayu sebelum masuk ke ruang hadapan premises tingkat (1). Saya dapati ada (2) lelaki Cina berlari menuju kearah saya.

[81] He further stated in para 6 of the report that after arresting and searching the bodies of the two appellants,

> saya seterusnya menjalankan pemeriksaan di bahagian *bawah* rumah kedai tersebut bermula dari bahagian hadapan, tengah dan belakang.

[82] However, during the trial, SP14 said the appellant were arrested at the ground floor of the premises. During examination-in-chief SP14 said he had instructed SP33 to inspect the first floor and that the appellants were arrested at the ground floor. He further contradicted himself when during cross-examination he denied saying he had instructed SP33 to inspect the first floor.

[83] SP33 however in his evidence said SP14 did instruct him to inspect the first floor and he did together with other team members including SP34.

[84] But SP34 in his evidence said he never went to the first floor of the premises, instead he was asked to guard the back of the premises. He even agreed with the defence's suggestion that SP33 had lied when SP33 told the court that SP34 went upstairs together with SP33.

[85] We were of the view that where the appellants were actually arrested in this case was extremely important to appreciate, as unlike the factual matrix in *Lee Boon Siah*, it is doubtful whether they actually had control and custody of the items found on the ground floor if they were caught or arrested on the first floor.

[86] The evidence in D184 and the oral evidence of the three said witnesses clearly contradicted each other and this contradiction was not mere contradiction but material contradiction as the lives of the appellants hinge upon the evidence. Our curiosity was further raised as D184 was never produced by the prosecution but the defence. What was it that the prosecution was trying to hide? When SP14 made his police report, D184, he was definitely aware of the existence of the first floor (*tingkat 1*) and the ground floor (t*ingkat bawah*). This was in stark contrast with his evidence in court.

[87] The original charge itself read 'Lot 185-1' which as confirmed by SP12, the landlord, as the address of the first floor of the said premises, This address was amended to 'Lot 185' only after the prosecution had called 16 witnesses.

[88] In the light of the contradictions inherent in the prosecution evidence, we could not but agreed with learned counsel for the appellants that there was grave doubt on the question of whether the appellants were arrested on the first or ground floor of the said premises and the benefit of the doubt ought to be resolved in favour of the appellants. Or course we were aware that there will always be discrepancies and contradictions in a case. However, in light of D184 and the sudden amendment to the charge, the evidence of the prosecution witnesses must be treated with caution and looked upon with suspicion. We adopt with approval what Vincent Ng JC (as he then was) had said in *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322:

> In such a case where the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the court will be left with no reliable and trustworthy evidence upon which a conviction of the acused might be based.

[89] With due respect to the learned trial judge, we found Her Ladyship's mind was clouded with her view that it was unnecessary for the prosecution to prove possession in case of manufacturing. Hence she had clearly failed to give proper evaluation, in fact no evaluation at all, to the material contraction of the evidence of the material witnesses especially SP14, SP33 and SP34 on whether the appellants were arrested on the ground or first floor of the premises which in our view was relevant to the question whether the appellants had control and custody of the dangerous drugs and the apparatus found on the ground floor. Those can clearly be seen in para 50 of Her Ladyship's grounds of judgment as follows:

> [50] Dengan demikian mahkamah memutuskan hujahan pembelaan mengenai percanggahan keterangan di antara saksi-saksi pendakwaan berkenaan fakta bahawa kedua- dua OKT ditangkap di tingkat bawah adalah tidak perlu dipertimbangkan.

[90] Our view is clear. The case of *Lee Boon Siah*, and the case of *Ong Hooi Beng*, can readily be distinguished from the instant case. In those two cases, the present of the drugs on the appellants' persons was a key element which provided the nexus between the appellants and the preparatory act of processing the drug. In consequence, they were arrested while they were engaging in the act of manufacturing. While in the instant appeal there were no traces of drugs found on the persons of the appellant at the material time when they were caught. There were also no traces of drugs on their nails or clothes they were wearing then. There was also no evidence of the processing of the drugs found then, not even by the chemist. Therefore we could not find any nexus between the appellants and the act of manufacturing.

[91] It was the version of the first appellant that he had rented the premises in the first charge to start a business dealing with CCTV and alarm system. The second appellant was his business partner. However, due to the rough start-up

of the business, the first appellant had decided to sub-rent the ground floor to his friend by the name of Ah Gu, Ah Kam and Ah Weng. Not long after that Ah Gu had sought the help of the appellants and some other friends to move some machines into the shop; to be used to manufacture 'ubat kuat lelaki'.

[92] There was evidence of SP4 which confirmed that the machines could not be carried into the building by merely two persons without the help of any forklift. There were multiple fingerprints of unknown individual found on several machines which could not be traced in the police database. There were also the finger prints of one Daniel Yeng Lin Saifullah on lifting card, J5, on the machines marked as A2 and A3. Besides, two cigarette butts recovered from the ground floor contained DNA of 'Male 1'.

[93] The evidence laid down above pinpoints the access possibility by the third party to the ground floor. It is trite that the burden is on the prosecution to exclude access of the said ground floor by others to prove that the appellants were exclusively in custody and control of the dangerous drugs and the machines found on the ground floor. The prosecution had failed to establish such evidence when the onus is not on the defence to prove possibility of access by others, but on the prosecution to exclude such possibility. The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. See: *Mohan Singh a/l Lachman Singh v Public Prosecutor* [2002] 3 MLJ 291

[94] We therefore agreed with learned counsel for the appellants that the fact that the appellants were seen carrying a few of the said machines into the premises explained how their fingerprints were found on some of the machines. But there were many of others too. Therefore that could not point to an irresistible inference that the appellants manufactured dangerous drugs in the premises. Their conduct of running towards the police upon arrest also in our view did not point to their guilt as if you do something wrong, you would definitely run away from the police not running towards them. To top it all off there was a doubt as to where actually the appellants were arrested. Not only that, the appellants were 'clean' at the time of the arrest. No drugs or traces of drugs were found on their person.

[95] We could not find any nexus to connect the appellant with the act of manufacturing. To reiterate, in our view, whether or not possession is necessary ingredients to be proven in a case involving manufacturing of dangerous drugs, would depend on the facts and circumstances of a particular case. In this instant appeal based on the facts and circumstances on when and how the appellants were arrested, we were of unanimous view that possession needs to be proven. Unfortunately the prosecution in our view had failed to do so. The

courts below in our view had misdirected themselves by way of non-directions in not considering the ingredient of possession.

[96] On the totality of the evidence before us we found that the conviction on the first charge on this ground alone was unsafe. We need not consider the other issues. We therefore allowed the appeal of both the appellants on the first charge and quashed the conviction as ordered by the High Court and affirmed by the Court of Appeal, and set aside the sentence of death. Consequently, we ordered both the appellants to be acquitted and discharged on the first charge.

[97] On the second charge, for the purpose of appeal before us, the second charge was only against the first appellant. It was the learned trial judge's finding that the premises of the second charge was used to store the drugs manufactured in the first charge:

> (86) ... bahawa premis 861 digunakan untuk menyimpan (*storing*) dadah yang dirampas ataupun yang diproses di premis no 185.
>
> ...
>
> ...
>
> (124) ... dengan jenis dadah yang sama yang diproses di premis rumah kedai dan yang dijumpai di rumah 861 adalah keterangan yang sangat relevant dan kukuh bahawa dadah-dadah yang diproses oleh OKT1 dan OKT2 disimpan di premis 861.

[98] Learned counsel for the first appellant submitted that as premises in for the second charge was purportedly used to store the drugs purportedly manufactured by the first appellant, if the first charge against the first appellant fails, the second charge must also fail and the second charge against the second appellant must be reduced to mere possession.

[99] We found merit in this argument. Especially so when there were other occupants in the house at the time of the raid. Hence, on the second charge, we quashed the conviction, set aside the sentence of death under sub-s 39B(2) against the second appellant and substituted for an offence punishable under sub-s 12(3) of the DDA 1952. After taking into consideration the mitigation put forward by the second appellant, we sentenced the second appellant to imprisonment for a period of five years with effect from the date of arrest.

Order accordingly.

Reported by Ashok Kumar